

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 19,046

CHARLES T. FAIR,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

964

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

United States Court of Appeals
for the District of Columbia Circuit

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1. a. Whether notwithstanding the absence of objection in the trial court this Court has the power to note and correct plain error affecting appellant's rights.

b. Whether the Court of Appeals should not affirm merely because prejudicial error is pointed out for the first time on appeal but should view all of the circumstances of the case.

2. Whether it was plain error for the court to repeat in part the statutory delineation of robbery without discussing and defining the constituent elements of the offense.

3. Whether it was plain error for the court to refuse to give an instruction as to identity.

4. Whether the court's instruction on alibi was plain error because the jury was not unequivocally instructed that the defense of alibi is a legitimate, legal, and proper defense.

5. Whether the court's instruction on the Government's burden of proof and on reasonable doubt was plain error for lack of explicitness.

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UNITED STATES COURT OF APPEALS
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No. 19,046

CHARLES T. FAIR,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Charles T. Fair, the appellant, was tried and convicted in the United States District Court for the District of Columbia of robbery, in violation of D.C.Code 22-2901. Judgment of conviction was entered on November 9, 1964, appeal noted and the District Court ordered that the appellant be authorized to proceed on appeal without prepayment of costs. This Court

has jurisdiction upon appeal to review the judgment of the
District Court under 28 U.S. Code §1291.

STATEMENT OF THE CASE

Appellant was tried before a jury on October 8-13, 1964, and convicted of robbery. The Government presented two witnesses - Tom Felde, 18 years of age, and George M. McConnell, Private, Metropolitan Police Force. Witness Felde testified that he was robbed of two dollars and a half pack of Winston cigarettes by five or six males at 1811 Irving Street. He testified to the general description of his chief assailant (Tr. 30) and identified in court the appellant as one of the robbers (Tr. 24), but he stated that during the time when he was riding in a police car searching for his assailants after the robbery he did not give a general description to the accompanying police (Tr. 34-35). Felde testified that he was able to recognize the three boys as participants when he saw that one of them--not the appellant--was wearing a football sweater which he remembered (Tr. 32). Upon cross-examination, Felde testified that he did not know which boy actually took the items from him (Tr. 37 and 40).

Private McConnell testified that Tom Felde had indeed given him a description of the chief robber while in the cruiser (Tr. 43-44); that the appellant and two males were sitting on a fence by a bus stop when first sighted and were there apprehended; that a one dollar bill and a half

pack of Winstons were found on the appellant. He testified that Jenkins, one of the three, was wearing a football jersey (Tr. 79-80). Private McConnell was unable to locate for the court the notes containing the description given by Felde (Tr. 59-60 and 64).

Defense counsel gave to the court his proposed instructions at the close of the Government's case (Tr. 67). The instructions included a charge as to identity and a charge as to alibi (Tr. 121).

The defense presented three witnesses--the defendant and the two males-who testified that they were with defendant during the alleged robbery and who were apprehended with appellant. Appellant testified that he and the other two were on Twenty-Six Street at the time of the robbery (Tr. 69) waiting for a friend. The defendant testified that none of them was wearing a football jersey (Tr. 79-80). Frank Jenkins corroborated the testimony of the defendant (Tr. 86-87 and 79-80). Lawrence Ray corroborated time and place (Tr. 99), and he remembered that neither the defendant nor himself had on a football jersey, but he could not recall what Jenkins was wearing (Tr. 101).

The court instructed the jury (Tr. 115-121). Defense counsel noted his objections to the original charge (Tr. 121). The court added further instructions (122-23). The court

recessed at 12:40 p.m. for lunch. At 3:20 p.m. the jury returned a verdict of guilty.

STATUTES INVOLVED

D. C. Code §22-2901 (1901): Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

18 U. S. Code §3741 [52 (b) Fed. R. Crim. P.]: PLAIN ERROR.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

I. A. Notwithstanding the absence of objection in the trial court, this court has the power to note and correct plain error affecting appellant's substantial rights.

B. The Court of Appeals should not affirm merely because prejudicial error is pointed out for the first time on appeal but should view all the circumstances of the case.

II. It was plain error for the court to repeat in part the statutory delineation of robbery without discussing and defining the constituent elements of the offense.

III. It was plain error for the court to refuse to give a requested instruction as to identity.

IV. The court's instruction on alibi was plain error because the jury was not unequivocally instructed that the defense of alibi is a legitimate, legal, and proper defense.

V. The court's instruction on the Government's burden of proof and on reasonable doubt was plain error for lack of explicitness.

SUMMARY OF ARGUMENT

Rule 52 (b) of Fed. R. Crim. P. authorizes the Court to hear and decide plain error or defects affecting substantial rights although they were not brought to the attention of the court below. Furthermore, the Court is at liberty to notice and correct all errors if the circumstances demand.

Because the court in its instruction as to the nature of the charge merely repeated in part the statutory expression of robbery, the jury did not have before it an explanation of the legal art words constituting robbery. Such failure to discuss and define the offense left the jury with an imprecise understanding of the law involved, and constituted plain error.

Though the verity of the complaining witness's identification of the defendant was an essential element of the case, the court refused to give the appellant's requested charge as to identity or any charge as to identity. This denial breached the appellant's right to have the court present instructions relating to his theory of the defense, and, as such, was plain error.

Similarly, the defense of alibi was crucial to the defense. The court after objection by the appellant did instruct as to the defense of alibi. But, the court's gratuitous comments on the alibi defense negated the effectiveness of the charge and caused the jury to infer that the court not only

saw little merit in the alibi defense but also that the court felt that said defense was itself suspect. Thus, the jury was not encouraged to weigh and consider the alibi defense as they were not instructed that the defense of alibi was a legitimate, legal, and proper defense.

Although the court instructed in general terms as to the government's burden of proof and reasonable doubt, the court nowhere instructed that in the event of failure by the Government to prove each of the elements of the offense beyond a reasonable doubt, a not guilty verdict is necessary. And too, such an instruction was not given in relation to the elements of the offense as components of the whole, to the defense of identity, or to the defense of alibi. Therefore, the jury was allowed to reach a verdict upon some vague general notion that the appellant did some sort of wrongful act.

These prejudicial errors thus necessitate a new trial.

I

- A. NOTWITHSTANDING THE ABSENCE OF OBJECTION IN THE TRIAL COURT THIS COURT HAS THE POWER TO NOTE AND CORRECT PLAIN ERROR AFFECTING APPELLANT'S SUBSTANTIAL RIGHTS.

This Court under authority of Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U. S. Code §3741, has the power to hear and decide plain errors or defects affecting substantial rights although they were not brought to the attention of the court below.

- B. THE COURT OF APPEALS SHOULD NOT AFFIRM MERELY BECAUSE PREJUDICIAL ERROR IS POINTED OUT FOR THE FIRST TIME ON APPEAL BUT SHOULD VIEW ALL OF THE CIRCUMSTANCES OF THE CASE.

In Crawford v. U.S., 91 U.S. App. D.C. 234, 198 F.2d 975 (1962), the court stated:

"The Court of Appeals should not affirm a conviction merely because prejudicial error is pointed out for the first time on appeal, but in determining whether prejudice has occurred when error is thus tardily asserted, judgment is to be exercised which does not turn in each instance upon treatment of the alleged error in isolation from other circumstances." (id. at 237).

This Court is at liberty to notice and correct error if the circumstances demand. Tatum v. U.S., 88 U.S. App. D.C. 386, 190 F.2d 612 (1951); McAffee v. U.S., 70 U.S. App. D. C. 142, 105 F.2d 21 (1939)

In reviewing the totality of circumstances in the in-

stant case it is urged that the court consider the following contentions of the appellant.

II

IT WAS PLAIN ERROR FOR THE COURT TO REPEAT IN PART THE STATUTORY DELINEATION OF ROBBERY WITHOUT DISCUSSING AND DEFINING THE CONSTITUENT ELEMENTS OF THE OFFENSE.

The court in its instruction must "discuss and define" the offense included within the indictment, or prejudicial error will result. Williams v. U.S., 76 U.S. App. D.C. 299, 300, 131 F.2d 21 (1942)

"We have always been proud that under our law the elements which go to make up a crime are definitely established.... [To require such] is not to demand meaningless ritual.... We merely insist that the judgment of a jury be informed and be made under the safeguards of correct procedure." Id. at 300.

Moreover, the court must "discuss and define" the offense charged in the indictment even though neither of the parties specifically so requests. (Mary) Jones v. U.S., 113 U.S. App. D.C. 352, 308 F.2d 307 (1962); Tatum v. U.S., 88 U.S. App. D.C. 386, 190 F.2d 612 (1951).

Though the court in the case under consideration did repeat in part the statutory delineation of robbery (Tr. 119-120), it did not discuss and/or define the constituent elements of the offense. No explanation of the following legal art words comprising statutory robbery was attempted: fear, violence,

against resistance, sudden or stealthy seizure, sudden or stealthy snatching, putting fear, person or immediate actual possession. According to the court's own words, it instructed "in substance" (Tr. 119). In finding prejudicial error for failure to discuss and define the elements contained in the charge, the court in the Williams case stated:

"It can now be clearly seen that to hold this charge sound would be to assume that jurors are wise in the law.... Such an assumption violates the accepted division of functions between judge and jury. It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know with clear delineation, the issues upon which it is to pass judgment.... The law requires it." Williams v. U.S., supra, at 301

The failure of the court here to discuss and define robbery constitutes plain error because the jury was forced to apply the facts to imprecise and confusing law.

III

IT WAS PLAIN ERROR FOR THE COURT TO REFUSE
TO GIVE AN INSTRUCTION AS TO IDENTITY

The verity of the complaining witness's identification of the appellant constituted one of the two cruxes of the case. The complaining witness testified that he gave no description

of his robbers to the police during the time that he was riding in the police car searching for his assailants (Tr. 34-35). Yet, the Officer called by the Government testified that a detailed description was given (Tr. 43-44). The complaining witness testified that he recognized his robbers "by the football sweater" one of them was wearing. (Tr. 32). The Officer testified that Jenkins, one of the three boys, was wearing a football jersey (Tr. 109). But, the appellant testified that none of them was wearing a football jersey (Tr. 79-80). The first alibi witness, Jenkins, likewise so testified (Tr. 79-80). And the second alibi witness testified that he was not wearing a football jersey, but that he could not remember what Jenkins had on (Tr. 101). In all, defense counsel spent the majority of his cross-examination of both Government witnesses questioning matters of identification. (As to the complaining witness: Tr. 33-35 and 38-40; as to the Officer: Tr. 51-53, 61-63 and 65).

Yet, despite the importance of the verity of the complaining witnesses' identification, the court refused defendant's prayer as to identity, a requested instruction that included a cautionary discussion of the possibility of mistake in identification and of the possible similarity of persons (Tr. 121).

In McAffee v. U.S., 70 U.S. App. D.C. 142, 105 F.2d 21

(1938), the Court established the general principle that:

"It is error not to give requested instructions if they correctly state the law and are warranted by the issues and the evidence, unless the substance of the requests is correctly, substantially and fairly covered by the general charge of the court or by other instructions of either party given by the court." Id. at 153.

Identity is nowhere mentioned in the instruction in question.

More particularly, in Tatum v. U.S., 88 U.S. App. D.C.

386, 190 F.2d 612 (1951), the Court stated that:

"... in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own." Id. at 391.

The Court's refusal to give the requested identity instruction or in the alternative its own identity instruction in this case was plain error as it denied to the appellant his right to have the court present instructions relating to his theory of the case.

IV.

THE COURT'S INSTRUCTION ON ALIBI WAS PLAIN ERROR BECAUSE THE JURY WAS NOT UNEQUIVOCALLY INSTRUCTED THAT THE DEFENSE OF ALIBI IS A LEGITIMATE, LEGAL, AND PROPER DEFENSE.

The second of the two cruxes of the appellant's case was the defense of alibi. All three witnesses for the defense

testified that they were with each other during the crucial period in another locality (the appellant--Tr. 69-70; Jenkins--Tr. 86-88; Ray--Tr. 99-101).

Defense counsel had submitted an alibi instruction which initially was refused by the court (Tr. 121). Upon defense counsel's objection (Tr. 121) and the Government's admission that an alibi instruction should be given (Tr. 122), the court instructed the jury as to alibi (Tr. 122-123). But, in the process of delivering the instruction to which the appellant was entitled (McAfee, supra, at p. 153 and Tatum, supra, at 391), the court gratuitously commented in such a manner as to prejudice the defendant. The court began the instruction by saying, "Counsel for the defendant Fair has asked me to add something to my charge to you which I thought was implicit in what I have said but maybe not" (Tr. 122). Ending the instruction, the court commented, "I didn't think it necessary to add that, but I have done so out of an abundance of caution" (Tr. 123). These asides could not help but indicate to the jury that the court not only saw little merit in the defense of alibi but also that said defense itself was suspect. Though the actual state of mind of the court is now inscrutable, we here are interested in the impression left on the jury. The total impact of the instruction falls short of the standard established in Goodall v. U.S., 86 U.S. App. D.C. 148, 180 F.2d

397 (1950), where the Court instructed in part:

"There has been testimony to the effect that the defendant was not present at the time and place when this homicide was committed. The defense of alibi is a legitimate, legal, and proper defense. The evidence adduced in support of this defense, like all the other evidence in the case, should be given such weight and such consideration as you may think it entitled to under all the facts and circumstances of the case." Id. at 152. (Emphasis added.)

The jury in our case was not told in unequivocal terms that the defense of alibi was "legitimate, legal, and proper" and that they should give it the weight they thought proper. Therefore, the instruction on alibi was inadequate and plain error.

V.

THE COURT'S INSTRUCTION ON THE GOVERNMENT'S BURDEN OF PROOF AND ON REASONABLE DOUBT WAS PLAIN ERROR FOR LACK OF EXPLICITNESS.

The Court's evaluation of the instructions in the McAffee case is apropos to the instructions in our case.

"Consideration of the whole of the instructions discloses that while the jury were told in the usual terms that the defendant was presumed to be innocent, and that the presumption of innocence continued with him throughout the case until overcome by proof beyond a reasonable doubt, and that the burden of proof was upon the Government, nevertheless.... nowhere in the instructions were the jury in terms told that unless they found beyond a reasonable doubt that all of the elements of some crime existed, they must acquit the defendant." McAffee v. U.S., 70 U.S. App. D.C., 142 150, 105 F.2d 21 (1939).

That same situation exists in our case. Whenever the court instructed as to the burden of proof and reasonable doubt, it did so in general terms--"to prove the guilt of the defendant" (Tr. 115), "consideration of all the evidence in the case" (Tr. 116) and "whether you have a doubt about the guilt of the defendant" (Tr. 120). Such a general exposition is plain error in this case in three respects.

First, regardless of the general instructions, it is error not to instruct explicitly that in the event of failure by the Government to prove each of the elements of the offense beyond a reasonable doubt, a not guilty verdict is necessary. McAffee, supra, at 150.

Secondly, when an alibi instruction is give, the jury should similarly be cautioned. No such cautionary instruction was given here. According to the Goodall alibi instruction, the Court should charge:

"If, after a full and fair consideration of all the facts and circumstances in evidence, you find the Government has failed to prove beyond a reasonable doubt that the defendant was present at the time and place of the commission of the offense charged in the indictment, then one of the essential elements of the offense is lacking, and it will be your duty to find the defendant not guilty." Goodall v. U.S., 86 U.S. App. D.C. 148, 153, 180 F.2d 397 (1950).

Thirdly, in the identity instruction that should have been given in this case (see Argument III), the court should have instructed that if the "circumstances of the identification

were not convincing," the jury should acquit. McKenzie v.

U.S., 75 U.S. App. D.C. 270, 273, 126 F.2d 533 (1942).

Failure to so instruct in "plain words" is error. McKenzie,
Id. at 273. No mention at all was made of identity in this
case.

"The purpose of such an instruction is to impress upon the mind of the triers of fact the proposition that guilt depends upon demonstration beyond a reasonable doubt of the existence of each of the several elements which, as a matter of law, constitute the crime charged, rather than upon some vague general notion that the defendant did some sort of wrongful act."
McAfee, supra, at 152.

Thus, in three different areas, the court failed to explicitly instruct as to the burden of proof and reasonable doubt and further failed to relate said instructions to the elements of the offense as components of the whole, to the defense of identity, or to the defense of alibi. Therefore, the jury was allowed to reach a verdict upon some vague general notion that the appellant did some sort of wrongful act.

CONCLUSION

WHEREFORE, appellant respectfully prays that the judgment of conviction below be reversed and the case remanded for an appropriate remedy.

Respectfully submitted,



William B. Martin

Counsel for Appellant
Appointed by this Court

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented:

1. Where a requested instruction on identity was denied and counsel did not renew his request for this instruction after the charge was completed, was it plain error affecting substantial rights for the court not to have given it?
2. Was the court's instruction on alibi plain error affecting substantial rights?
3. Was the court's instruction on reasonable doubt plain error affecting substantial rights?
4. Was the court's instruction on robbery plain error affecting substantial rights?

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

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UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged with robbery (22 D.C. Code § 2901) in a one-count indictment filed July 20, 1964. On October 8, 1964, he was tried to a jury and subsequently convicted of that offense. He was sentenced under the provisions of the Federal Youth Corrections Act (18 U.S.C. § 5010(b)).

Events of June 19, 1964

Appellant, emboldened that night in June by a phalanx of "associates," inquired of Olaf Tom-Felde, as the latter

walked along a public thoroughfare in the District, whether he could borrow fifteen cents. Tom-Felde, a stranger to appellant, denied the request (Tr. 26). After a second request was met with a similar rebuff, appellant seized the initiative and attacked Tom-Felde striking him to the head. Fair's associates, upon seeing counter-blows to the assault showed their disapprobation of that course by themselves setting upon Tom-Felde. The latter broke free and ran into an apartment building closely pursued. Upon cornering him inside appellant demanded: "Give me your money. Give me your money." (Tr. 26-27.). The complainant was subsequently dragged outside and relieved of his wallet containing two dollar bills and also half-a-pack of Winston cigarettes. The bills were apparently folded in a peculiar fashion (Tr. 28). Appellant wore a brown turtle-neck sweater and had on a flat type of cap. The complainant also recalled that another of his assailants wore a football jersey with numerals on it (Tr. 30).

Tom-Felde bleeding from his nose and mouth sought out the police. An Officer McConnell and his partner took him in their cruiser to hunt down the robbers. Soon thereafter Tom-Felde described Fair and two others sitting atop a fence. As the cruiser approached appellant averted his head, but to no avail, for a companion was wearing a football jersey, and all three were summoned to the police car. At that time appellant was identified by the complainant. Observed on the former's sweater were some spots of blood (Tr. 31, 33).

Officer McConnell outlined appellant's arrest and the incidental seizures of a single dollar bill which had been situated next to Fair's billfold (the billfold itself contained no money (Tr. 67)), and two opened packs of cigarettes removed from his right front pocket, Phillip Morris and half-a-pack of Winston's. The dollar bill was folded in the peculiar fashion that Tom-Felde had described (Tr. 46-50).

In defense, appellant and his two companions, who were also arrested with him that evening, testified in sub-

stance that all three had been together and at a different location from the situs of the robbery at the time it was perpetrated. They had been waiting for Jerome Whitaker who was to take them to a party; but after he failed to appear they walked to a bus stop where the arrests occurred (Tr. 68-71, 85-90, 98-102).

On cross-examination appellant and each of his witnesses denied wearing a football jersey on the night of June 19 (Tr. 79, 92, 104). However, their signals were apparently crossed, for Officer McConnell on rebuttal testified that one of them was indeed wearing such a jersey with red numerals on it (Tr. 109). See Tr. 92.

The jury did not credit the proffered defense (Tr. 124).

STATUTE AND RULES INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 30, Federal Rules of Criminal Procedure, provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its

verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52(b), Federal Rules of Criminal Procedure, provides:

Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

Objections to the court's instructions were not preserved below and are accordingly unavailable at this stage in the proceedings. Fed. R. Crim. P. 30

In any event, failure to give appellant's proffered instruction on identity was not plain error when the sole issue at trial was whether or not appellant was the robber and the charge on reasonable doubt obviously concerned and was directed to that issue.

As part of an alibi instruction there is no requirement that the court specifically inform the jury that alibi is a legitimate, legal and proper defense or that jurors should give it the weight they think proper. The court's digressive remarks about the instruction (the instruction having been given after defense counsel requested it at a bench conference) merely reflected a belief that the main charge had in effect already covered the alibi defense; the remarks in no way intruded upon the jury's consideration of that defense.

The jury was adequately appraised of the role of reasonable doubt in this case and the charge thereon was not defective for lack of explicitness.

While the robbery instruction was not as detailed as it might have been, its brevity did not affect substantial rights herein because the court, relying upon the assumption of trial counsel that the robbery had been committed, removed that issue from jury consideration in its instruc-

tion on the alibi defense. For the court to do so was within permissible tolerances of its discretion. Thus, there is no reasonable possibility that a fuller robbery instruction could have altered the verdict.

ARGUMENT

Introduction

Appellant was represented below by a staff attorney with the Legal Aid Agency who did not preserve any objections to the multitude of alleged errors in the trial court's instructions now pressed upon this Court. Nor can it be urged that trial counsel was inattentive to the charge, for he sought and obtained an addition hereto when a portion of it was not to his liking (Tr. 121). Accordingly, appellant "may [not] assign as error any portion of the charge or omission therefrom" at this stage in the proceedings. Fed. R. Crim. P. 30; *Pitts v. United States*, 99 U.S. App. D.C. 63, 237 F.2d 217 (1956); *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950). Compare *Bray v. United States*, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962), with *McKnight v. United States*, 114 U.S. App. D.C. 40, 309 F.2d 660 (1962). This is a sufficient ground to overcome all of his points on appeal which rest upon a popular notion of plain error.

None the less, we shall also respond on the merits to these freshly perceived errors.

- I. It was not plain error affecting substantial rights for the court not to have given appellant's proffered instruction on identity; nor was the court's alibi instruction plainly erroneous.

(Tr. 20-21, 33-40, 116-123; Tr. C.A. 5-19)

In the opening round of this trial defense counsel framed the issued thusly:

Ladies and gentlemen of the jury: This will be undoubtedly a fairly simple and uncomplicated case.

When the Government has concluded with its evidence, the defense will present three witnesses, the defendant and two others, ... The defense will be that of alibi, which you may know by now has a rather special meaning in law. The witnesses for the defendant will testify that at all times when the crime which will be presented to you could have been committed, the defendant was in fact with them; and therefore the inference from their testimony will be that he could not possibly have been at the scene of the robbery for he was with others." (Opening statement by defense counsel at Tr. 20-21).

Counsel followed up this theory of the defense by attempting to undermine Tom-Felde's identification of appellant as his assailant (Tr. 33-40); and through testimony of an alibi.

Counsel's closing argument was similarly directed toward the only jury considerations in the case *i.e.*, identification of appellant and the credibility of the defense witnesses (Tr. C.A. 8-14).¹

"It all boils down to Mr. Tom-Felde's ability to make as positive an identification of the defendant as he did in court. I want to think about his identification [and so on] (Tr. C.A. 9-12).

"... , I would (also) suggest to you that it is impossible for you to disregard entirely the testimony of three witnesses. Three witnesses: the defendant, Lawrence Ray and Frank Jenkins, all three of whom stand before you—or stood before you yesterday, unimpeached by prior convictions.

And I think you have gathered by now, and I need not remind you that Mr. Epstein is a competent prosecutor. He's good. If he could have found factors to use in impeaching these witnesses, you can bet that he would have. But he wasn't able to impeach or discredit them in any substantial way, was he?" (Tr. C.A. 12-13).²

¹ "Tr. C.A." refers to the supplemental transcript of closing arguments.

² The main thrust of the prosecutor's closing and rebuttal argu-

The court then instructed in part:

"When the law says that if you have a reasonable doubt about the guilt of the defendant, you must acquit him, it envisions a conscientious belief for which you can give to yourself a reason and a reason that makes sense—that there is a reasonable view of the matter which raises a doubt in your minds" (Tr. 116).

"In determining whether you have a reasonable doubt about the guilt of the defendant and in determining, therefore, whether your verdict should be 'guilty,' or 'not guilty,' you must evaluate as well as you can the testimony of every individual who took the witness stand which includes in this case the defendant himself, because he elected to testify, and thus, as is the case with every other witness, puts his own credibility in issue.

"Now, bring to the task of weighing and evaluating the testimony of the witnesses your own good common sense and your own experience in life and your knowledge of human nature Take into account their opportunities for observation, their sources of knowledge, their intelligence (Tr. 117).

"You will decide whether you have a doubt about the guilt of the defendant. If it is a reasonable doubt, then you should find him not guilty. If you don't have a doubt or if it isn't a reasonable doubt, if it isn't a doubt which makes sense, then your verdict should be guilty" (Tr. 120).

The Court also instructed at length on the factors to utilize in evaluating credibility of witnesses (Tr. 117-119).

After a bench conference requested by defense counsel the court instructed on alibi:

"Counsel for the defendant Fair has asked me to add something to my charge . . . which I though was implicit in what I have said but maybe not.

ments also concerned the identification, and an attack upon the credibility of the defense witnesses (Tr. C.A. 5-8, 14-19).

The defense you heard—and you certainly must know—is that the defendant was not present at the time, that he was elsewhere with his friends, that he did not commit the offense.

Well, obviously, in order to find him guilty you have got to find that he was there and that he is the one who—even though with others—that he is the one who robbed the complaining witness. His defense is what is commonly known as 'alibi,' which simply means, 'I wasn't there, and I couldn't therefore have committed the crime.' If he was somewhere else and if it was someone else who committed the robbery, then obviously he isn't guilty. I didn't think it necessary to add that, but I have done so out of an abundance of caution." (Tr. 122-123).

Viewing the trial as a whole it is apparent that the questions of 1. identity, and 2. alibi, were facets of the same issue *i.e.*, whether or not appellant was the robber. If the defense were credited that would have ended the trial in appellant's favor. If the jurors thought the defendant and his witnesses were lying (and there could have been no "mistake" about the matter) they would obviously have concluded that Tom-Felde was accurate in his identification. In the circumstances of this case, it would have been a novel feat for the jury to have found the alibi defense a sham and yet to have acquitted appellant because of a reasonable doubt over the identification made. But the jury was not precluded from doing precisely that for the reasonable doubt instruction was bottomed on the unstated premise of *a reasonable doubt as to defendant's identity*. That was the common sense of the matter and there is not a reasonable possibility that the jurors misunderstood this, for identification of the robber was the only real question before them. A reasonable doubt of appellant's guilt could only refer therefore to identity *i.e.*, was he the one who perpetrated the offense? Failure to give the requested instruction was not plain error in these circumstances. *Jones v. United States*, 113

U.S. App. D.C. 233, 307 F.2d 190 (1962), *cert. denied*, 372 U.S. 919 (1963); *Obery v. United States*, 95 U.S. App. D.C. 28, 217 F.2d 860 (1954), *cert. denied*, 349 U.S. 923 (1955): And see *United States v. Di Donato*, 301 F.2d 383, 386 (2d Cir.), *cert. denied*, 370 U.S. 917 (1962). *Cf. Wheeler v. United States*, 82 U.S. App. D.C. 363, 165 F.2d 225 (1947), *cert. denied*, 333 U.S. 829 (1948) (an instruction need not be given in the precise terms requested).

We do not understand appellant's contention that it was plain error for the court not to have instructed the jury "that the defense of alibi was 'legitimate, legal, and proper, and that they should give it the weight they thought proper'" (Br. 16). He cites *Goodall v. United States*, 86 U.S. App. D.C. 148, 180 F.2d 397, *cert. denied*, 339 U.S. 987 (1950) as establishing that standard formulation (Br. 15). In that case, the Court passed upon the adequacy of a particular alibi instruction then before it; no pattern of words was there established as immutable. Compare e.g., *United States v. Fay*, 19 F.2d 620 (D.C. Idaho), *affirmed*, 22 F.2d 740 (9th Cir. 1927); *Fielder v. United States*, 227 Fed. 832 (8th Cir. 1915). Without the phrases now deemed talismanic we do not suppose that the jury thought the court's instruction was not to be credited; its observations merely reflected a belief that the prior instructions had in effect covered the substance of the alibi defense, the comments in no way can be deemed to have intruded upon the jury's consideration of that defense.

II. The court's instruction on reasonable doubt was not plain error affecting substantial rights.

As previously observed, the only real "issue" for the jury to consider in this case was whether appellant committed the robbery. (See Argument I, *supra*.) The instruction on reasonable doubt could only have been understood as directed towards that issue and thus the jury

was adequately informed of the role of reasonable doubt herein.³

McAffee v. United States, 70 App. D.C. 142, 105 F.2d 21 (1939), a death case, is distinguishable because there the jury was not informed that a reasonable doubt could result in acquittal, but only in different degrees of homicide. This Court agreed with the defendant that the "jury must have concluded that they were obliged to find the defendant guilty of homicide in some degree, . . . and . . . were not given to understand that 'not guilty' was also a possible verdict." In those circumstances it was error not to inform the jury "that they might find him not guilty unless convinced beyond a reasonable doubt of the existence of every element of *some offense*." at 70 App. D.C. 150, 105 F.2d at 209 (emphasis supplied.) See *Moore v. United States*, No. 18867, March 4, 1965 n.1 at slip opinion 2. ("Each of the elements of the offense" language vis-a-vis reasonable doubt omitted.)

Compare *McKenzie v. United States*, 75 U.S. App. D.C. 270, 126 F.2d 533 (1942), with *Jones v. United States*, *supra*; *Obery v. United States*, *supra*; and *United States v. Di Donato*, *supra*.

III. The court's instruction on robbery was not plain error affecting substantial rights.

(Tr. 122-123)

While the robbery instruction was not as detailed as it might have been, it was not plainly erroneous in the circumstances of this case. The case was tried below on the assumption that the complainant had been robbed. The requested alibi instruction was predicated upon this assumption, for the court during the course of that instruction effectively removed the issue of robbery from jury consideration (Tr. 122-123). This it could do.

"[As] is frequently the case, if a fact essential to the crime, although not expressly admitted, is un-

³ That instruction perforce bore on the two aspects of that issue i.e., identification of appellant and the alibi defense.

disputed and is treated during the trial by all concerned as established, it would not be reversible error for the court to so charge, unless, and the exception is vital, the defendant should ask to have it submitted to the jury, and in that event, even in such a case, it would be the duty of the court to submit it accordingly." *People v. Jackson*, 247 N.Y. 36, 38, 159 N.E. 715, 716 (1928).

Accord, Richardson v. United States, 338 F.2d 552 (D.C. Cir. 1964) (removal of case of death issue by court in homicide case not reversible error when "counsel seemed to concede this fact.") See also *Malone v. United States*, 238 F.2d 851 (6th Cir. 1956). Thus a fuller robbery instruction could not have changed the verdict: there is not "a reasonable possibility that the [error] . . . complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963). Compare *Byrd v. United States*, No. 18896, January 14, 1965 (issue not taken from jury, and no concession inferable); *(Mary) Jones v. United States*, 113 U.S. App. D.C. 352, 308 F.2d 307 (1962) (omission to charge on critical element of an offense, the element being hotly contested, held; plain error).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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Assistant United States Attorneys.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

CHARLES T. FAIR,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

FILED MAY 28 1965

Nathan J. Paulson
NO. 18-048
CLERK
(Criminal No. 679-64)

MOTION FOR REHEARING EN BANC

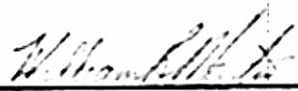
Comes now the appellant, Charles T. Fair, by and through his attorney, and moves the Honorable Court for a rehearing en banc.

As grounds for the above Motion, it is stated:

1. Oral argument was given on May 5, 1965, before Circuit Judge Fahy, Senior Circuit Judge Bastian, and Circuit Judge Burgher.
2. On May 20, 1965, this Court ordered per curiam that the judgment of the District Court appealed from be affirmed.
3. Circuit Judge Fahy dissented "because of the inadequacy of the instruction on robbery. He is unable to distinguish the case from Byrd v. United States" _____ U.S. App. D.C. _____ (No. 18,896 dec. January 14, 1965).
4. Appellant submits that it was plain error for the court below to repeat in part the statutory delineation of

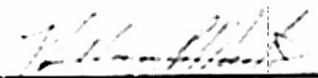
robbery without discussing and defining the constituent elements of the offense. As authority appellant cites Byrd v. United States, ibid.

5. Counsel for appellant avers that this Motion is presented in good faith and not for delay.


WILLIAM B. MARTIN
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Rehearing En Banc, has been personally served on the office of Allan M. Palmer, Esquire, Assistant United States Attorney, for the District of Columbia, United States Court House, Washington, D.C., this 28th day of May, 1965.


WILLIAM B. MARTIN